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IN THE

Supreme Court of the United States

October Term, 1982

GEORGE V. KECKEISEN, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

EDWARD A. PFEFFER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

JOHN BUCHANAN, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether convictions of mail fraud and a related conspiracy can be sustained on the basis of findings showing employees filed false conflict of interest statements omitting receipt of gratuities from a vendor doing business with defendants' employer.

2. Whether convictions of mail fraud and a related conspiracy must be reversed because of inconsistency with the judgment of the court below that found defendants not guilty of charges under the Elkins Act.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	10
I. Convictions of Mail Fraud and a Related Conspiracy Cannot Be Sustained on the Basis of Findings Showing Employees Filed False Conflict of Interest Statements Omitting the Receipt of Gratuities From a Vendor Doing Business With Their Employer	10
II. Convictions of Mail Fraud and a Related Conspiracy Are Inconsistent With the Judgment of the Court Below That Defendants Were Not Guilty of Charges Under the Elkins Act and, Therefore, Defendants' Convictions in a Non-Jury Trial Must Be Reversed	16
CONCLUSION	19
APPENDIX:	
Judgment Order of the United States Court of Appeals for the Third Circuit of September 14, 1982, *re* Keckeisen	A1
Judgment Order of the United States Court of Appeals for the Third Circuit of September 14, 1982, *re* Pfeffer	A4
Judgment Order of the United States Court of Appeals for the Third Circuit of September 14, 1982, *re* Buchanan	A7
Memorandum and Order of the United States District Court for the Eastern District of Pennsylvania Entered January 14, 1982	A10
Order of the United States Court of Appeals for the Third Circuit Denying Rehearing of October 13, 1982 (Pfeffer and Keckeisen)	A34
Order of the United States Court of Appeals for the Third Circuit Denying Rehearing of October 13, 1982 (Buchanan)	A36

TABLE OF AUTHORITIES

Cases:	Page
Abbott v. United States, 239 F. 2d 310 (5th Cir. 1956)	13
American Express Co. v. United States, 212 U. S. 522 (1909)	17
Baltimore & Ohio Chicago Terminal R. Co. v. United States, 583 F. 2d 768 (3d Cir. 1978)	17
Harris v. Rivera, — U. S. —, 70 L. Ed. 2d 530 (1981)	17
McElheny v. United States, 146 F. 2d 932 (9th Cir. 1944)	16
Rivera v. Harris, 643 F. 2d 86 (2d Cir. 1981)	17
Union Pacific R. Co. v. United States, 313 U. S. 450 (1941)	17
United States v. Bohonus, 628 F. 2d 1167 (9th Cir.), *cert. denied*, 447 U. S. 928 (1980)	14
United States v. Braverman, 373 U. S. 405 (1963)	18
United States v. Brodbeck, 430 F. Supp. 1056 (E. D. Wis. 1977)	14
United States v. Brown, 540 F. 2d 364 (8th Cir. 1976)	15
United States v. Bryza, 522 F. 2d 414 (7th Cir. 1975), *cert. denied*, 426 U. S. 912 (1976)	15
United States v. Bush, 522 F. 2d 641 (7th Cir. 1975), *cert. denied*, 424 U. S. 977 (1976)	14
United States v. Duz-Mor Diagnostic Laboratory, Inc., 650 F. 2d 223 (9th Cir. 1981)	16
United States v. General Motors Corp., 226 F. 2d 745 (3d Cir. 1955)	17
United States v. George, 477 F. 2d 508 (7th Cir.), *cert. denied*, 414 U. S. 827 (1973)	15
United States v. Hasenstab, 575 F. 2d 1035 (2d Cir. 1977), *cert. denied*, 439 U. S. 827 (1978)	15
United States v. Isaacs, 493 F. 2d 1124 (7th Cir.), *cert. denied*, 417 U. S. 976 (1974)	15
United States v. Kelly, 507 F. Supp. 495 (E. D. Pa. 1981)	14
United States v. Lea, 618 F. 2d 426 (7th Cir. 1980)	14
United States v. Mandel, 391 F. 2d 1347 (4th Cir. 1979), affirmed in banc by an equally divided court, 602 F. 2d 653 (4th Cir. 1979), *cert. denied*, 445 U. S. 961 (1980)	15

TABLE OF AUTHORITIES (Continued)

Cases (Continued): Page

United States v. Maybury, 274 F. 2d 899 (2d Cir. 1960) . . 16, 17, 18
United States v. McNeive, 536 F. 2d 1245 (8th Cir. 1976) . . . 12, 15
United States v. Michael Schiavone & Sons, Inc., 430 F. 2d 231 (1st Cir. 1970) 17
United States v. Procter & Gamble Co., 47 F. Supp. 676 (D. Mass. 1942) 13
United States v. Rabbitt, 583 F. 2d 1014 (8th Cir. 1978), *cert. denied*, 439 U. S. 1116 (1979) 10, 12, 15
United States v. Reece, 614 F. 2d 1259 (10th Cir. 1980) 14, 15
United States v. Sells, 325 F. 2d 161 (2d Cir. 1963) 16
United States v. Tankel, 331 F. 2d 204 (2d Cir. 1964) 16
United States v. Von Barta, 635 F. 2d 999 (2d Cir. 1980) . . . 12, 14
United States v. West, 549 F. 2d 545 (8th Cir.), *cert. denied*, 430 U. S. 956 (1977) 16
United States v. Wilson, 342 F. 2d 43 (2d Cir. 1965) 16
United States v. Zambardi, 276 F. 2d 169 (2d Cir.), *cert. denied*, 364 U. S. 842 (1960) 16

Rules:

Federal Rule of Criminal Procedure 23(c) 16

Statutes:

18 U. S. C. § 1341 . . . . . 2, 4, 10, 11, 16
28 U. S. C. § 1254(1) 1
49 U. S. C. § 41(1) 17

OPINIONS BELOW

The Memorandum and Order of the United States District Court for the Eastern District of Pennsylvania, adjudging defendants guilty of mail fraud and conspiracy, is not reported. A copy of the Memorandum is printed in the Appendix at A10.

JURISDICTION

The judgments of the United States Court of Appeals for the Third Circuit, printed in the Appendix, at A34 and A36, were entered on October 13, 1982. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CODE, TITLE 18

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom

it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

49 USCS § 11903

§ 11903. Rate, discrimination, and tariff violations

(a) A person that knowingly offers, grants, gives, solicits, accepts or receives by any means transportation or service provided for property by a common carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title [49 USCS §§ 10501 et seq.] (1) at less than the rate in effect under chapter 107 of this title [49 USCS §§ 10701 et seq.], or (2) by practicing discrimination, shall be fined at least $1,000 but not more than $20,000, imprisoned for not more than 2 years, or both.

STATEMENT OF THE CASE

Defendants were charged in a 21 count indictment alleging violations of 18 U. S. C. § 1341 (mail fraud) and 49 U. S. C. § 41 (Elkins Act).

Count 1 of the indictment charges a conspiracy among the defendants to violate the mail fraud and Elkins Act statutes. According to the allegations in Count 1, American Airlines hired trucking companies for the transportation of freight to and from airline terminals. During the time period framed by the indictment, defendants Keckeisen, Pfeffer and Buchanan were American Airlines employees in management positions connected with American's shipment of freight. Pinto Trucking Service, Inc. (hereinafter "PTS") was engaged in the business of freight transportation by truck. According to the indictment at Count 1, PTS was hired by American to transport freight to and from American terminals and the American Airlines defendants, as managers of freight sales and service, received "kickbacks, bribes and gratuities" from PTS to exercise their influence over the acquisition and retention of American's over-the-road freight business by PTS.

Count 1 charges the payment of checks to "J & M Special" or "J. Special" to the benefit of defendant Pfeffer; [1] checks to "E. & G. Company" received by defendant Keckeisen; [2] and checks to Nanette Buchanan received by defendant Buchanan.[3] The receipt of these payments by the American defendants was in violation of American's conflict of interest policy prohibiting the acceptance of anything of value from any entity doing business with

1. Joan Special was the maiden name of defendant Pfeffer's wife.

2. Keckeisen was also charged with having the use of automobiles owned by and registered to PTS.

3. Nanette Buchanan is defendant Buchanan's wife.

American. The overt acts charged in Count 1 correspond to the transmission of checks by mail from PTS to the American employee defendants.

Counts 2 through 13 charge substantive mail fraud violations by the American employee defendants in connection with the payment of money to Keckeisen, Pfeffer and Buchanan, an alleged violation of the American employees' fiduciary responsibilities to provide loyal and faithful services to their employer.

Counts 14 and 21[4] charge violations of the Elkins Act against defendants, specifically alleging that the payments received "knowingly caused to be granted, given, accepted and received a rebate, concession and discrimination in respect to the transportation of property in interstate commerce by [PTS], whereby advantage was given, discrimination practiced; and property transported at a less rate than that named in the applicable tariffs filed by [PTS]".

The case proceeded to trial in the Eastern District of Pennsylvania, without a jury, on September 9, 1981. On January 14, 1982, the court entered a Memorandum and Order finding all of the defendants guilty of conspiracy and mail fraud in Counts 1 through 13, but not guilty of the Elkins Act violations charged in Counts 14 through 21.

The district court concluded that no Elkins Act violation occurred since the Government failed to demonstrate any relationship between the payments made by PTS and any discrimination practiced to the benefit of PTS, a conclusion patently inconsistent with the verdict of guilty on each of Counts 1 through 13, where a conspiracy and mail fraud violations were premised upon the loyal and faithful services deprivation of American by its employees.

Facts stipulated to by the Government compel the conclusion that no fraud occurred, and under the circumstances, none was possible. The American Air Freight

4. All of the defendants were acquitted on all of these charges.

Transportation Service was headquartered in New York City, headed by the Vice President for Freight Marketing. American also maintained local freight departments at the various airport terminals, managed by a local employee known as "Manager of Freight Sales and Services." Ground transportation by truck in the American freight operation from one American facility to another was known as "hub-trucking." Hub-trucking was a profitable concept which produced substantial revenues for American, a concept which employed trucking companies, including PTS, to undertake ground transportation of freight between air terminals. The only official at American authorized to contract on behalf of American was the Vice President for Freight Marketing in New York City. Conversely, none of the local managers, or their employees, including the American employee defendants here, possessed the authority to establish a hub-trucking run or to approve the selection or termination of the trucking companies to be utilized. The local manager's responsibility was limited to recommending truckers to the office of the Vice President for Freight Marketing in New York City, addressing the questions of whether the proposed hub-trucker would charge appropriate rates, whether he was capable of providing the requisite service and whether the schedule proposed by the trucking company met the airline's needs.

Defendants Keckeisen, Pfeffer and Buchanan were never employed by American in the offices of the Vice President for Freight Marketing. Pfeffer was Manager of Freight Sales and Services in Philadelphia from 1966 to 1971, when he was transferred to American's administrative staff in New York City as Director of Freight Forwarding. In this latter capacity, Pfeffer had no authority over hub-truck operations. In 1974, Pfeffer became Manager of Freight Sales and Services for American at the O'Hare

Airport in Chicago. In 1975, the Vice President for Freight Marketing, acting on the recommendation of the local managers of the Chicago and Indianapolis facilities, and in light of the advice of the general staff on review of those recommendations, awarded the hub-truck run between those facilities to Pinto Trucking Service. Defendant Pfeffer, Manager of Freight Sales and Services at the Chicago airport, favored that action. The Manager of Indianapolis concurred. PTS offered superior service at lower costs, including painting its trucks with the American Airlines logo.

George Keckeisen was transferred to Philadelphia in 1971 to become Manager of Freight Sales and Services. In 1976, he was assigned as Manager of Freight Sales and Services at the John F. Kennedy Airport in New York.

In 1977, the Vice President of Freight Marketing, acting on the recommendation of the local managers of the New York and Syracuse facilities, and in light of the advice of the general staff on review of those recommendations, did not award a hub-run between those facilities to PTS. Defendant Keckeisen, Manager of Freight Sales and Services in New York, recommended PTS. After review and analysis by the general staff, the Vice President did not accept this recommendation.

John Buchanan had been Keckeisen's assistant in Philadelphia and when Keckeisen was transferred to New York, Buchanan became Manager, Freight Sales and Services, Philadelphia.

In 1976, the Vice President for Freight Marketing, acting on the recommendation of the local managers, and in light of the advice of the general staff, awarded the hub-runs between Dallas and Fort Worth, Texas, and Oklahoma to PTS. None of the defendants served at the local facilities involved or in the corporate staff who reviewed the recommendations. The only part that any

defendant played in the subsequent decision concerning the awarding of the Dallas-Fort Worth hub-truck runs was that defendant Keckeisen suggested to George A. Shipman, the Vice President of Freight Marketing, that he talk with Mr. Pinto, the President of PTS, as a possible candidate for the hub-truck runs in the southwest area. Thereafter, Mr. Shipman did speak with Mr. Pinto and ultimately recommended him to the Managers in the Texas and Oklahoma cities. Shipman also supported PTS's application for I. C. C. rights for those hub-truck runs.

Until the termination of their employment each of the American Airlines employees received job promotions and favorable job performance ratings from their superiors and co-workers at American. None of the witnesses from American who testified at trial were critical of the job performances of any of the American employee defendants.

It was agreed upon by the Government that between 1966 and 1981, when American and PTS were involved in contracts for hub-trucking services, American was satisfied with the quality of service provided by PTS, and the tariff rates charged by PTS were generally comparable to, or less than, those charged by other trucking companies. The government further agreed that, with respect to the acceptance of money by Keckeisen, Pfeffer and Buchanan, these payments could be accurately characterized as "gratuities." No American employee defendant was ever asked to take any action contrary to the best interest of, or disloyal to, American.

The acceptance of these gratuities was in violation of internal American rules regarding employee behavior, and the American Airlines employees deleted receipt of these payments from conflict of interest statements filed with his employer.

Although American terminated the employment of defendants Buchanan, Keckeisen and Pfeffer in 1978 when it discovered they had been receiving gratuities from PTS, American continued to utilize the services of PTS until 1981.

Finally, as agreed by the government in the stipulation of undisputed facts, the Vice President of American for Freight Marketing, the individual in charge of the hub-trucking business at American, with knowledge of the job performances and capacities of Keckeisen, Pfeffer and Buchanan, stated his belief that if the American employee defendants had received gratuities from PTS, he could not understand what they could have done for PTS in return.

REASONS FOR GRANTING THE WRIT

I. Convictions of Mail Fraud and a Related Conspiracy Cannot Be Sustained on the Basis of Findings Showing Employees Filed False Conflict of Interest Statements Omitting the Receipt of Gratuities From a Vendor Doing Business With Their Employer

The convictions of defendants of mail fraud and a related conspiracy charge are an unprecedented and unwarranted expansion of the scope of this federal offense. The mail fraud statute, 18 U. S. C. § 1341, defines the gist of the offense in these terms: "scheme or artifice to defraud, or for obtaining money or property by means of false and fraudulent pretenses, representations, or promises." It is the government's theory that employees of American Airlines devised a scheme or artifice to defraud their employer when they took gratuities from PTS and falsely reported to American Airlines that they had not done so. There were no sustainable findings of fact in the court below that these employees intended to injure their employer in any way or, that their actions had any harmful effect on American Airlines. False statements about gratuities on conflict of interest reports do not make out a federal crime of mail fraud.

In the case that most closely resembles the present case, the Eighth Circuit held that there was no federal crime. *United States v. Rabbitt*, 583 F. 2d 1014 (8th Cir. 1978), *cert. denied*, 439 U. S. 1116 (1979). The defendant had been a member of the Missouri House of Representatives and eventually became the Speaker of the House. While a member of the House, Rabbitt offered to use his influence to help a firm of architects to get contracts for architectural services on public buildings; in exchange, Rabbitt required a fee of 10 percent from any resulting contracts. Rabbitt carried out his part of the

scheme, and the firm received contracts. Payments of Rabbitt's fee were concealed by paying them through a law firm. There was no evidence of financial loss to the state. The government contended that Rabbitt's conduct was fraudulent because it deprived the citizens of Missouri of their right to his honest and faithful service. The Eighth Circuit rejected this contention:

> Whether a showing of dishonesty on the part of a state official, outside his official duties, with no financial loss to the state constitutes a fraud upon the public and thereby statutory mail fraud is, in our judgment, highly questionable. Every case of breach of public trust and misfeasance in office in connection with which some mailing has occurred does not and cannot fall within the confines of the mail fraud statute. In the instant case, we hold that the evidence does not establish mail fraud within the federal statute.
>
> . . . The evidence clearly shows that Rabbitt acted unethically and violated his canons as a lawyer, a candidate disclosure statute requiring disclosure of fees received during the preceding twelve months, and possibly a Missouri law rendering "partiality" or abuse in public office unlawful. But such violations, although bearing on intent to defraud, do not in and of themselves establish the substantive crime of mail fraud under 18 U. S. C. § 1341.
>
> . . . There is no evidence that Rabbitt's use of his friendship, position, and influence to aid [the architects] in obtaining contracts resulted in inferior work, greater expense, or any other tangible loss to the citizens or state.
>
> We also find no evidence that Rabbitt's conduct deprived the citizens of their right to honesty and

> fairness to the conduct of his official duties. Rabbitt did not, in his official capacity, control the awarding of state contracts to architects. . . .
>
> To affirm the convictions on the . . . mail fraud counts would mean expansion of the statute beyond its application in prior political corruption cases. This we refuse to do. (583 F. 2d at 1024-1026) (footnotes omitted).

The Eighth Circuit decision in *Rabbitt* is in accord with its earlier decision in *United States v. McNeive*, 536 F. 2d 1245 (8th Cir. 1976).

The Second Circuit has also rejected the broad argument that would bring employer-employee disputes within the scope of federal mail fraud:

> In the instant case, we are asked to construe two seemingly limitless provisions, the mail and wire fraud statutes, in the context of the employer-employee relationship. The government urges us to hold that these statutes are violated whenever an employee, acting to further a scheme for pecuniary gain, intentionally breaches a fiduciary duty of honesty and loyalty he owes his employer. . . . [W]e reject the sweeping theory advanced by the government. . . .

United States v. Von Barta, 635 F. 2d 999, 1001-1002 (2d Cir. 1980) (footnotes omitted).

In the present case, as in *Von Barta*, there were violations of the corporate policy of the employer. The American Airlines employees denied receiving gratuities in violation of a company rule. That did not prevent them from carrying out their official duties to their employer. American Airlines has made no complaint of any actions that these employees took in the performance of their responsibilities. As in *Rabbitt*, these employees did not

have the authority to enter into contracts. PTS was selected by a senior vice president of American Airlines, and the district court found that American was fully satisfied with the price and quality of the trucking services provided by PTS. That view did not change even after American Airlines became aware of the gratuities their employees had accepted.

Mail fraud cases in which convictions of employees have been upheld fall into four categories:

(1) Employees' stealing and exploiting assets that belong to their employers;

(2) Employees' deceiving their employers into entering into contracts with entities secretly owned by those employees;

(3) Purchasing agents' abusing their authority to contract for their principals by demanding kickbacks from firms wishing to do business with those principals.

(4) Elected, high level public officials' violations of public trust.

The prosecution in this case fits into none of these categories.

The leading case involving employee exploitation of employer's assets arose from a scheme by the Procter & Gamble Company to obtain trade secrets and formulas from their competitor, Lever Brothers Company. Procter & Gamble bribed employees of Lever Brothers to obtain experimental cakes of soap, secret processes, and other trade data. *United States v. Procter & Gamble Co.*, 47 F. Supp. 676 (D. Mass. 1942). In *Abbott v. United States*, 239 F. 2d 310 (5th Cir. 1956), two employees of a petroleum exploration company stole copies of maps con-

taining important geophysical information and sold them to a competing enterprise. The most recent example involved two Sperry Univac employees who sought to exploit, through their own business, computer software that belonged to their employer. *United States v. Kelly*, 507 F. Supp. 495 (E. D. Pa. 1981).

In several cases, employees deceived their employers into entering into contracts with supposedly outside firms, but which were secretly owned by the employee. The press secretary of the mayor of Chicago arranged for the city to award a major advertising contract to a firm that the press officer owned. His mail fraud conviction was upheld. *United States v. Bush*, 522 F. 2d 641 (7th Cir. 1975), *cert. denied*, 424 U. S. 977 (1976). Two other cases involved employees in the private sector. One was the prosecution of officers of a mortgage company who had obtained a substantial loan for a company they controlled without disclosing their other roles. *United States v. Brodbeck*, 430 F. Supp. 1056 (E. D. Wis. 1977). In a recent Second Circuit case, already referred to, a salesman and trader for a securities firm speculated in more than $50 million in government bonds through a corporation that he secretly owned without revealing that he had been trading for his own account. The employee had committed the credit of the securities firm to back his trading, and the firm ultimately bore a major loss when the speculation failed. *United States v. Von Barta, supra.*

There have been a considerable number of mail fraud convictions of purchasing agents who extracted kickbacks from firms who wished to do business with their employers. Using the power to make contracts for their principals, these agents could demand payments from the outside firms. *United States v. Bohonus*, 628 F. 2d 1167 (9th Cir.), *cert. denied*, 447 U. S. 928 (1980); *United States v. Lea*, 618 F. 2d 426 (7th Cir. 1980); *United States*

v. Reece, 614 F. 2d 1259 (10th Cir. 1980); *United States v. Hasenstab*, 575 F. 2d 1035 (2d Cir. 1977), *cert. denied*, 439 U. S. 827 (1978); *United States v. Bryza*, 522 F. 2d 414 (7th Cir. 1975), *cert. denied*, 426 U. S. 912 (1976); *United States v. George*, 477 F. 2d 508 (7th Cir.), *cert. denied*, 414 U. S. 827 (1973). While the purchasing agent cases generally arise from employment in the private sector, one prosecution involved a city building commissioner who extracted kickbacks from firms who wanted to do demolition work for the city. *United States v. Brown*, 540 F. 2d 364 (8th Cir. 1976).

Mail fraud convictions were upheld in two cases where the defendants exercised the extraordinary powers of the office of state governor. One involved the Governor of Maryland. *United States v. Mandel*, 391 F. 2d 1347 (4th Cir. 1979), affirmed in banc by an equally divided court, 602 F. 2d 653 (4th Cir. 1979), *cert. denied*, 445 U. S. 961 (1980). The other prosecution was of a close associate of a governor. *United States v. Isaacs*, 493 F. 2d 1124 (7th Cir.), *cert. denied*, 417 U. S. 976 (1974). These political corruption cases were based upon the defendants' receiving payments for the exercise of the many powers and discretion of a state governor. Prosecutions of lesser government officials, as already indicated, did not withstand appellate review. *United States v. Rabbitt, supra; United States v. McNeive, supra.*

The prosecution in the present case does not fit into any of these four categories. There is no charge here that the employees stole an asset belonging to their employer. The employees did not induce American Airlines to let contracts to a firm that they secretly owned. These employees were not purchasing agents. And, of course, these employees may have violated a corporate policy on gratuities, but they certainly were not involved in high level political corruption.

Defendants should not be convicted of federal mail fraud on the basis of gratuities received from PTS and concealed from their employer. There is not even a civil suit by American Airlines against the employees. No officer or executive of American Airlines found anything to criticize in their work. For violating the company conflict of interest rules, they forfeited their jobs. That is an inadequate basis for bringing the weight of federal criminal law to bear.

Defendants' conviction of mail fraud should be reversed. The related charge of conspiracy to commit mail fraud falls for the same reason.

II. Convictions of Mail Fraud and a Related Conspiracy Are Inconsistent With the Judgment of the Court Below That Defendants Were Not Guilty of Charges Under the Elkins Act and, Therefore, Defendants' Convictions in a Non-Jury Trial Must Be Reversed.

In non-jury criminal trials in the federal system, a trial court is required by Federal Rule of Criminal Procedure 23(c) to make findings of fact. The explicit special findings and the court's conclusions must be consistent. This principle, sometimes described as the *Maybury* rule, has had its most extensive articulation in the rulings of the Court of Appeals for the Second Circuit. *United States v. Maybury*, 274 F. 2d 899 (2d Cir. 1960); *United States v. Zambardi*, 276 F. 2d 169 (2d Cir.), *cert. denied*, 364 U. S. 842 (1960); *United States v. Sells*, 325 F. 2d 161 (2d Cir. 1963); *United States v. Tankel*, 331 F. 2d 204 (2d Cir. 1964); *United States v. Wilson*, 342 F. 2d 43 (2d Cir. 1965). *But see, United States v. West*, 549 F. 2d 545 (8th Cir.), *cert. denied*, 430 U. S. 956 (1977). *Compare United States v. Duz-Mor Diagnostic Laboratory, Inc.*, 650 F. 2d 223 (9th Cir. 1981), with *McElheny v. United States*, 146 F. 2d 932 (9th Cir. 1944).

This Court recently addressed the question in the context of a federal habeas corpus proceeding. The Second Circuit had concluded that the *Maybury* rule governed non-jury trials not only in federal criminal prosecutions, but applied also to bench trials in state criminal courts. *Rivera v. Harris*, 643 F. 2d 86 (2d Cir. 1981). This Court, while holding that the *Maybury* rule does not apply to the states, acknowledged that the familiar principle that inconsistency is not sufficient to set aside a jury verdict does not apply in the different setting of a non-jury trial. *Harris v. Rivera*, — U. S. —, 70 L. Ed. 2d 530 (1981).

The district court here found defendants not guilty of any violation of the Elkins Act. 49 U. S. C. § 41(1), holding:

> The government has failed to develop of record evidence beyond a reasonable doubt that there was a deviation from the tariff rates published and filed by PTS.

The court's determination that defendants are not guilty under the Elkins Act is inconsistent with its conclusion they are guilty under the mail fraud statute as a result of receiving payments that the court characterized as bribes, kickbacks and gratuities.

Courts have given a very broad reading to the Elkins Act. Most of these decisions have involved civil sanctions under the Act. *Union Pacific R. Co. v. United States*, 313 U. S. 450 (1941); *American Express Co. v. United States*, 212 U. S. 522 (1909); *United States v. Michael Schiavone & Sons, Inc.*, 430 F. 2d 231 (1st Cir. 1970); *United States v. General Motors Corp.*, 226 F. 2d 745 (3d Cir. 1955). *See also Baltimore & Ohio Chicago Terminal R. Co. v. United States*, 583 F. 2d 768 (3d Cir. 1978). It is evident from these cases that the Act is violated when a carrier

gives value to a shipper in order to win shipping business. That principle was confirmed by this Court in a criminal prosecution under the Elkins Act. *United States v. Braverman*, 373 U. S. 405 (1963). In *Braverman*, moreover, this Court held that payment by a carrier to an employee of the shipper, in that case the transportation manager, would violate the Act.

The district court here concluded that the Government had failed to prove that there was any deviation from the tariff rates filed by PTS. Necessarily, this conclusion rejects any connection between the payments to the American Airlines' employees and the contracts for shipment of goods between American Airlines and PTS. The court's holding of *no nexus* between the payments and the contracts was, no doubt, correct. The court's conclusion of lack of nexus between the payments and the contracts is inconsistent with the keystone findings of fact that undergird the convictions of mail fraud and a related conspiracy.

If defendants accepted bribes, kickbacks and gratuities, and as a result, PTS obtained and retained shipping business, under *United States v. Braverman, supra*, a criminal violation of the Elkins Act would have occurred. The district court concluded, and properly so, that there was no such violation of the Elkins Act. In accordance with the *Maybury* rule, the convictions of defendants for mail fraud and the related conspiracy cannot be affirmed.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to the Court of Appeals for the Third Circuit so that this Honorable Court may review and correct the decision below.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1169

UNITED STATES OF AMERICA

v.

GEORGE V. KECKEISEN,

Appellant

(D.C. Criminal No. 81-00057-02)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Submitted Under Third Circuit Rule 12(6)

September 14, 1982

Before: GIBBONS, WEIS and SLOVITER, *Circuit Judges*

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JUDGMENT ORDER

George V. Keckeisen appeals from a judgment of sentence following his conviction in a bench trial of mail fraud, 18 U.S.C. § 1341, and conspiracy, 18 U.S.C. § 371. He contends:

(1) that there was insufficient evidence to establish that his employer was defrauded;

(2) that there was insufficient evidence of his intent to defraud;

(3) that there was insufficient evidence of a single rather than multiple conspiracies;

(4) that the pre-sentencing memorandum filed by the government violated due process;

(5) that he was prejudiced by a joint trial with the other alleged conspirators.

These contentions are without merit.

It is ORDERED and ADJUDGED that the judgment of the district court is affirmed.

By THE COURT,

/s/ JOHN J. GIBBONS
Circuit Judge

Attest:
/s/ SALLY MRVOS
Sally Mrvos, Clerk

DATED: SEP 14 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1165

UNITED STATES OF AMERICA

v.

EDWARD PFEFFER,

Appellant

(D.C. Criminal No. 81-00057-03)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Submitted Under Third Circuit Rule 12(6)
September 14, 1982

Before: GIBBONS, WEIS and SLOVITER, *Circuit Judges*

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JUDGMENT ORDER

Edward A. Pfeffer appeals from a judgment of sentence following his conviction in a bench trial of mail fraud, 18 U.S.C. § 1341, and conspiracy, 18 U.S.C. § 371. He contends:

(1) that there was insufficient evidence to establish that his employer was defrauded;

(2) that there was insufficient evidence of his intent to defraud;

(3) that there was insufficient evidence of a single rather than multiple conspiracies;

(4) that the pre-sentencing memorandum filed by the government violated due process;

(5) that he was prejudiced by a joint trial with the other alleged conspirators.

These contentions are without merit.

It is ORDERED and ADJUDGED that the judgment of the district court is affirmed.

By THE COURT,

/s/ JOHN J. GIBBONS
Circuit Judge

Attest:
/s/ SALLY MRVOS
Sally Mrvos, Clerk

DATED: SEP 14 1982

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1170

UNITED STATES OF AMERICA

v.

JOHN BUCHANAN,

Appellant

(D. C. Criminal No. 81-00057-04)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Submitted Under Third Circuit Rule 12(6)
September 14, 1982
Before: GIBBONS, WEIS and SLOVITER, *Circuit Judges*

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JUDGMENT ORDER

John Buchanan appeals from a judgment of sentence following his conviction in a bench trial of mail fraud, 18 U. S. C. § 1341, and conspiracy, 18 U. S. C. § 371. He contends:

(1) that there was insufficient evidence to establish that his employer was defrauded;

(2) that there was insufficient evidence of his intent to defraud;

(3) that there was insufficient evidence of a single rather than multiple conspiracies;

(4) that the pre-sentencing memorandum filed by the government violated due process;

(5) that he was prejudiced by a joint trial with the other alleged conspirators.

These contentions are without merit.

It is ORDERED and ADJUDGED that the judgment of the district court is affirmed.

By THE COURT,

/s/ JOHN J. GIBBONS
Circuit Judge

Attest:

/s/ SALLY MRVOS
Sally Mrvos, Clerk

DATED: SEP 14 1982

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 81-00057

UNITED STATES OF AMERICA

v.

BIAGIO ROBERT PINTO, a/k/a BOB PINTO, GEORGE V. KECKEISEN, EDWARD PFEFFER and JOHN BUCHANAN

MEMORANDUM AND ORDER

HANNUM, *J.* JANUARY 14TH, 1982

On February 26, 1981, the grand jury returned a twenty-one (21) count indictment charging the defendants, collectively, with mail fraud and Elkins Act offenses as well as conspiracy. 18 U.S.C. § 1341, 49 U.S.C. § 41(1); 18 U.S.C. § 371.[1] Essentially, the defendants al-

1. 18 U.S.C. § 1341 provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail

1. (Cont'd.)

according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

49 U.S.C. § 41(1) provides:

(1) Anything done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under sections 41, 42, or 43 of this title, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by sections 41, 42, or 43 of this title, with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offtending shall be subject to a fine of not less than $1,000 nor more than $20,000 for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than

legedly combined in a single conspiracy whereby the defendants Keckeisen, Pfeffer and Buchanan abused their employment positions with American Airlines for personal profit by affording preferential contract or bargaining status to a business controlled by the defendant Pinto.

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1. (Cont'd.)

$1,000 nor more than $20,000: Provided, That any person, or any officer or director of any corporation subject to the provisions of sections 41, 42, or 43 of this title, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

(a) A person that knowingly offers, grants, gives, solicits, accepts, or receives by any means transportation or service provided for property by a common carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (1) at less than the rate in effect under chapter 107 of this title, or (2) by practicing discrimination, shall be fined at least $1,000 but not more than $20,000, imprisoned for not more than 2 years, or both.

18 U.S.C. § 371 provides, in part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Pinto Trucking Service [hereinafter "PTS"] was a common carrier engaged in the business of transporting merchandise and freight by motor vehicle which received several regional contracts from American Airlines to perform trucking services. The case was tried to the Court without a jury and at its conclusion counsel were directed to submit proposed findings of fact and conclusions of law. On December 29, 1981, a narrative of undisputed facts was filed, *see* Docket Entry No. 86, pp. 1-12, which additionally contained a list identifying a number of unresolved factual issues. The Court will render findings of fact as it perceives them, relying principally upon counsels' submission of undisputed facts. The disputed factual issues will be resolved therein.

Findings of Fact[2]

1. At all times material herein, American Airlines provided air freight transportation services which were actively conducted by separate freight departments located at various airport terminals. Managers of freight sales and services conducted the business of the local operations but were administratively overseen by the Vice President for Freight Marketing.

2. Services performed by the local departments which are material to the prosecution of this case are what is known in the industry as "HUB" trucking and the processing of international freight through customs. The concept of "HUB" trucking entailed the utilization of trucking companies to transport freight from one local American Airlines' facility to another. Processing international freight through customs involved the unloading and stor-

2. The Court will provide references to the record in support of its findings with respect to disputed facts. When undisputed facts are found and recorded, there will be no reference to the record. Instead, see Docket Entry No. 86.

age of freight, the confirmation and preparation of bills of lading, airway bills, interline agreements and invoices and the clearing of freight through customs. The term "inbound—in bond" is frequently used in conjunction with this latter freight service and refers to the bonding requirements for handling freight entering the United States from abroad.

3. As earlier mentioned, "HUB" trucking services were usually performed by independent carriers which had been retained by American Airlines. Decisions concerning the procurement, retention and discharge of local "HUB" truckers were generally reached in accordance with an American Airlines' policy whereby both field and staff personnel were utilized. Essentially, the local freight sales and services managers would undertake a determination whether a "HUB" trucker was needed and, depending upon that determination, would make a recommendation of a particular carrier to satisfy the perceived need. This recommendation was to be based upon several factors including tariff rates, quality of service and availability of equipment. The local managers' recommendation would be forwarded to the Director of Freight Marketing and, ultimately, to the Vice President for Freight Marketing for approval. Although the local managers were empowered to merely recommend a particular carrier, their recommendations were usually adopted primarily because of the deference afforded their perceived familiarity and expertise with local situations. *See* Notes of Testimony, pp. 3.16, 4.51, 5.21.

4. As will be further developed, PTS was an independent carrier utilized by American Airlines to perform "HUB" trucking services. PTS was effectively owned and controlled by the defendant Pinto and was located at 1414 Calcon Hook Road, Sharon Hill, Pennsylvania.

5. The defendant George Keckeisen was employed by American Airlines in various capacities from at least, for purposes of this case, 1971 and until April of 1978. In 1971, he replaced the defendant Edward Pfeffer as Manager of Freight Sales and Services in Philadelphia and remained in that position until August of 1976. At that time, he was transferred to New York to manage freight sales and services at the JFK airport terminal.

6. The defendant Edward Pfeffer was employed by American Airlines in various capacities from at least, for purposes of this case, 1966 and until April of 1978. In 1966, he began serving as Manager of Freight Sales and Services in Philadelphia and continued that function until sometime in 1971 when he was promoted to an administrative position requiring service in New York. His title in New York was that of Director of Freight Forwarding Sales. Subsequently, in September of 1974, he was transferred to O'Hare Airport in Chicago to serve as Manager of Freight Sales and Services.

7. The defendant John Buchanan was employed by American Airlines in various capacities from at least, for purposes of this case, 1966 and until April of 1978. From at least 1966 until August of 1976, he served in Philadelphia as Supervisor of Freight Services under the management of both the defendants Pfeffer and Keckeisen. In August of 1976, he was promoted to the position of Manager of Freight Sales and Services in Philadelphia, replacing the defendant Keckeisen.

8. Until their employment was terminated, each of the defendants Keckeisen, Pfeffer and Buchanan received job promotions or promotional transfers at various times of their respective careers. Their job performances, respectively, were generally viewed favorably by American Airlines' personnel.

9. The evidence, developed of record, both directly and inferentially establishes that the defendant Pinto, in order to further the business interests of PTS, extended bribes, kickbacks and gratuities to the defendants Keckeisen, Pfeffer and Buchanan who in turn afforded the defendant Pinto a preferred and exceptional status with respect to the eventual award of American Airlines' "HUB" trucking routes and the provision of certain services. The defendants Keckeisen, Pfeffer and Buchanan's intentional receipt of bribes, kickbacks and gratuities resulted in the preferred and exceptional selection, retention and increase of PTS contractual relationships with American Airlines in a manner significantly corresponding to the promotions and transfers of the American Airlines' defendants.[3] *See* Finding of Fact No. 3.

10. During the entire period of the alleged conspiracy from 1966 until January of 1978, the defendant Keckeisen directly and indirectly, through conduits, received money payments in the form of business checks upon the instance of the defendant Pinto. Additionally, in 1974, the defendant Keckeisen accepted and received a 1973 Mercury Station Wagon from the defendant Pinto. The defendant Keckeisen accepted these gratuitous payments and merchandise and negotiated or utilized them for his personal benefit in conscious violation of an American Airlines' conflict of interest policy.[4] *See also* Government Exhibits Nos. 857-857(b), 858-858(a).

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3. Citations to the record in support of this finding is not immediately supplied *but will be included in subsequent findings elaborating upon this point.* In addition, the Court notes that its finding that all of the defendants intentionally engaged in a reciprocal exchange of favors does not imply that a single conspiracy rather than multiple conspiracies existed. This important aspect of the case will be addressed separately. *See* Findings of Fact Nos. 31-34.

4. *See* Finding of Fact No. 15 for a brief discussion of American Airlines' conflict of interest policy.

11. During the entire period of the alleged conspiracy from 1966 until January of 1978, the defendant Pfeffer directly and indirectly, through conduits, received money payments in the form of business checks upon the instance of the defendant Pinto. The defendant Pfeffer accepted these gratuitous payments and negotiated them for his personal benefit in conscious violation of an American Airlines' conflict of interest policy.[5] *See also* Government Exhibit Nos. 856-856(g).

12. During the entire period of the alleged conspiracy from 1966 until January of 1978, the defendant Buchanan directly and indirectly, through conduits, received money payments in the form of business checks upon the instance of the defendant Pinto. The defendant Buchanan accepted these gratuitous payments and negotiated them for his personal benefit in conscious violation of an American Airlines' conflict of interest policy.[6] *See also* Government Exhibit Nos. 855-855(h).

13. Information of the defendants Keckeisen, Pfeffer and Buchanan's financial relationship with the defendant Pinto was material to the conduct of business by and best interests of American Airlines inasmuch as "HUB" trucking was a viable aspect of American Airlines' business and

5. *See* note 4 *supra.*

6. *See* note 4 *supra.* The Court notes that one of the factual issues in dispute contained in Docket Entry No. 86 concerns whether the defendant Buchanan received cash from the defendant Pinto. The inclusion of this issue as one in dispute appears to be inconsistent with the itemization in the same document of those factual issues the resolution of which is not in dispute. Perhaps this apparent inconsistency may be explained as a matter of semantics; that is, cash versus checks. Notwithstanding, the Court specifically finds that the defendant Buchanan did receive, directly or indirectly, gratuitous payments from the defendant Pinto, both in the form of business checks as well as cash. *See* Notes of Testimony, pp. 1.69-.73.

the defendants Keckeisen, Pfeffer and Buchanan's recommendation of "HUB" trucking carriers was integral to its conduct.

14. The business checks specifically identified in Counts 1-4, 6-12 and 14-21, inclusive, of the indictment were admittedly among the aforementioned business checks utilized by the defendant Pinto to accomplish money payments to the defendants Keckeisen, Pfeffer and Buchanan. Additionally, the aforementioned business checks were intentionally distributed to the defendants Keckeisen, Pfeffer and Buchanan through the use of the mail system.

15. The aforementioned American Airlines' conflict of interest policy essentially prohibited its employees or members of their immediate families from receiving money or gifts from suppliers of goods or services. There is no direct evidence that the defendant Pinto knew of this policy.

16. PTS exclusively operated the Philadelphia "HUB" trucking routes at least as early as 1966, *see* Notes of Testimony, pp. 3.145-.146; 4.66, 4.78, and continued this function until sometime in 1981. *See* Notes of Testimony, p. 5.78.

17. During the tenure of PTS's exclusive operation of "HUB" trucking in Philadelphia, each of the defendants Keckeisen, Pfeffer and Buchanan served as Manager of Freight Sales and Services. As earlier found, *see* Findings of Fact Nos. 5-7, the defendant Pfeffer served in this capacity from 1966 until sometime in 1971, the defendant Keckeisen from sometime in 1971 until August of 1976 and the defendant Buchanan from August of 1976 until his termination in April of 1978. In addition, the defendant Buchanan served as Supervisor of Freight Services under

the direction of both defendants Pfeffer and Keckeisen from 1966 until August of 1976. *See* Finding of Fact No. 7.

18. As a consequence of the defendants Pfeffer, Keckeisen and Buchanan's collective [7] extension of a preferred and exceptional status to the defendant Pinto and PTS over the period from 1966 until April of 1978, American Airlines was deprived of the opportunity to search for or gain access to a carrier providing a higher quality of service or a lower price.[8] While PTS was the sole "HUB" trucker physically located in Philadelphia which was equipped to service American Airlines' local operation, *see* Notes of Testimony, pp. 3.128, 8.64, there existed carriers located outside Philadelphia which were equipped to service American Airlines although there is some uncertainty with respect to their route authority. *See* Notes of Testimony, pp. 3.139-.140, 8.71. In this latter regard, there is no requirement that a carrier be located in an area of service as evidenced by the ability of PTS to perform services for American Airlines in Chicago and Dallas. *See* Notes of Testimony, pp. 4.34 and 3.140.

19. On December 3, 1974, PTS was awarded the Chicago-Indianapolis "HUB" trucking route servicing American Airlines. *See* Government Exhibit No. 808(b). *See also* Notes of Testimony, p. 3.81.

20. At the time PTS was initially awarded the lucrative Chicago-Indianapolis "HUB" trucking route, the de-

7. The Court's use of the word "collective" does not imply a finding of a conspiracy but rather merely refers to the different tenures of the American Airlines' defendants while serving as Manager of Freight Sales and Services in Philadelphia. *But see* Finding of Fact Nos. 31-34.

8. This is not intended to suggest that the service offered by PTS was inferior or its prices excessive. *See* Finding of Fact No. 29.

fendant Pfeffer was Manager of Freight Sales and Services at O'Hare Airport and had functioned in that capacity only since September of 1974. The defendant Pfeffer had in fact recommended PTS over the existing carrier, Commercial Motor Freight Company [hereinafter "Commercial"], on November 18, 1974 based upon his stated perception that PTS could provide a better service at a lesser rate. *See* Government Exhibit No. 808(a); Notes of Testimony, p. 3.17. The defendant Pfeffer stated in his November 18, 1974 memo to the Indianapolis general manager that PTS would charge a flat rate per pallet rather than the exclusive-use, trip charge made by Commercial which would result in savings to American Airlines in excess of $3,000.00 per month. Additionally, the defendant Pfeffer noted the superiority of equipment provided by PTS. Although not mentioned in the defendant Pfeffer's memo, PTS had also agreed to paint the American Airlines logo on its trucks, unlike Commercial. *See* Notes of Testimony, p. 4.21.

21. Based upon the statements made in the defendant Pfeffer's aforementioned recommendation, it appears as though PTS made a more attractive offer to American Airlines to service the Chicago-Indianapolis "HUB" trucking route than that extended by Commercial. PTS, however, failed to comply with the terms of its offer once awarded the route. *See* Notes of Testimony, pp. 6.20-.21. PTS almost immediately began charging American Airlines an exclusive truck rate while continuing to carry freight for other customers as well as charging American Airlines for round-trip carriage when only one-way services were provided. *See* Government Exhibit Nos. 811(c), (e), (g), (i), 833(b); Notes of Testimony, pp. 3.92, 4.37-.38. As a consequence, PTS's actual charges for similar services were 12% higher than those charged earlier by Commercial. *See* Notes of Testimony, p. 6.20-.21. In this regard, Commer-

cial was adequately, if not equally, equipped and qualified as PTS to continue the operation of servicing the Chicago-Indianapolis "HUB" trucking route. *See* Notes of Testimony, pp. 4.18-.19. PTS provided an additional charge to American Airlines for painting the latter's logo on its trucks. *See* Notes of Testimony, pp. 4.27-.28.

22. In 1976, the defendant Keckeisen recommended to American Airlines' administrative offices that PTS be given a proposed "HUB" trucking route between Boston, New York and Philadelphia. No decision with respect to this and other recommendations forthcame from the administrative offices inasmuch as the purpose underlying the need for a single "HUB" trucking route was eliminated. *See* Notes of Testimony, p. 5.16.

23. In May of 1976, the American Airlines' freight department in Philadelphia began processing international freight through customs for PTS.

24. At the time American Airlines commenced supplying this service to PTS, the defendant Keckeisen served as Manager of Freight Sales and Services and the defendant Buchanan acted as his Supervisor of Freight Services. As earlier found, in August of 1976, the defendant Buchanan was promoted to the manager position, replacing the defendant Keckeisen who had been transferred to New York. *See* Notes of Testimony, p. 4.100.

25. The utilization by PTS of American Airlines' Philadelphia freight department for the processing of international freight was primarily related to its carriage of "inbound—in bond" materials. In this regard, the processing of PTS's "inbound—in bond" freight involved additional effort and services than that usually extended or provided other customers of American Airlines. *See* Notes of Testimony, pp. 3.149, 3.167-.170. In addition, it ap-

pears that PTS received these services at a rate substantially less than that charged other customers of American Airlines. The normal rate varied between 1¼ cents to 2 cents per pound with a minimum charge of $300.00 per month while PTS was merely charged 1 cent per pound during May of 1976 and ¼ cent per pound thereafter. *Compare* Notes of Testimony, p. 4.94 *with* Government Exhibit Nos. 790(a)-(r).

26. The defendants Pinto, Keckeisen and Buchanan contend that the provision of a lower rate to PTS is attributable to the prior inefficient use of American Airlines' employees and thereby resulted in the more effective use of what is known in the industry as "down time" and that if the lower rate had not been afforded PTS it would not have utilized the service. The record developed in this case, however, reflects that American Airlines eventually was required to employ more persons to perform the services utilized by PTS and others. *See* Notes of Testimony, pp. 4.127, 4.134-.135. Additionally, it would appear more prudent to utilize "down time" employees in a manner more effectively increasing revenue than at the comparatively nominal rate charged PTS. Finally, the failure of the defendants Keckeisen and Buchanan to procure the required contract approval of the administrative offices of American Airlines and the unusual procedures involved in the mailing of invoices casts dispersions on the entire arrangement. *See* Notes of Testimony, pp. 4.109, 4.156-.157 and 4.107, 4.158.

27. The defendant Keckeisen administered—prior to its mailing—the processing of the invoice dated July 15, 1976 by providing the necessary factual information for its preparation. *See* Notes of Testimony, p. 5.106; Government Exhibit No. 790(b). The defendant Buchanan administered—prior to its mailing—the processing of the in-

voice dated August 23, 1976 by providing the necessary factual information for its preparation. *See* Notes of Testimony, pp. 4.103, 5.106; Government Exhibit No. 790(c).[9]

28. In the Fall of 1977, American Airlines was in the process of deciding which carrier to select for the operation of its New York-Syracuse "HUB" trucking route. During the course of the decision-making process a controversy arose between the respective managers of New York and Syracuse concerning which of two carriers was appropriate to service their route. The New York manager, the defendant Keckeisen, recommended PTS while the Syracuse manager recommended Herlihy Trucking Company [hereinafter "Herlihy"]. *See* Notes of Testimony, pp. 5.23-.24. The defendant Keckeisen based his recommendation on his opinion that Herlihy provided unreliable service in a couple of instances and that PTS charged a lower rate. *See* Government Exhibit No. 761. Upon the completion of an American Airlines' investigation, it was discovered that the defendant Keckeisen was in error both with respect to his complaints about the reliability of Herlihy's service and the cost differential he said favored PTS. *See* Notes of Testimony, pp. 5.28, 5.33 and 5.33. As respects cost of service, it was learned that PTS on at least one occasion charged American Airlines the round-trip rate when only one-way service was provided. *See* Notes of Testimony, pp. 5.29, 5.37. The defendant Keckeisen never acknowledged his error despite advice to the contrary but rather continued his recommendation of PTS. *See* Notes of Testimony, pp. 5.35, 5.37. Ultimately, Herlihy was selected to service the route. *See* Notes of Testimony, p. 5.23.

29. From at least 1966 until sometime in 1981, American Airlines was satisfied with the quality of service pro-

9. *See* Counts 5 and 13 of the Indictment, respectively.

vided and the tariff rates filed by PTS. In fact, American Airlines continued to utilize the carriage service of PTS for approximately three years subsequent to the termination from employment of the defendants Keckeisen, Pfeffer and Buchanan.

30. During the defendant Pfeffer's tenure as Director of Freight Forwarding Sales, he was empowered to recommend the creation of "HUB" trucking routes as well as carriers but had no authority to ultimately approve or disapprove. *Compare* Notes of Testimony p. 4.52 *with* pp. 4.64-.65. The defendant Pfeffer's power to recommend extended only so far as his familiarity with local operations and apparently was not unlike the power afforded local managers of freight sales and services. *See* Notes of Testimony, p. 4.52.

31. The provision of monetary payments and gifts by the defendant Pinto to each of the defendants Keckeisen, Pfeffer and Buchanan and the reciprocal provision of business-related favors by each to the defendant Pinto irrefutably establishes the existence of an agreement between the defendant Pinto and each of the defendants Keckeisen, Pfeffer and Buchanan. *See* Notes of Testimony, pp. 3.68-.69, 3.75-.75.

32. On several occasions, the defendants Keckeisen and Buchanan met at the defendant Pinto's business office. *See* Notes of Testimony, pp. 1.64-.67, 1.76. Moreover, the defendants Keckeisen and Buchanan jointly contributed to the provision of international freight services to the defendant Pinto. *See* Notes of Testimony, p. 4.112.

33. In November of 1972, two anonymous letters were received at the American Airlines' office located in Philadelphia. One of the letters was addressed to the defendant Keckeisen and alleged that the defendant Bu-

chanan's wife was receiving payments from PTS. The defendant Keckeisen conducted an initial but inconsequential inquiry and failed to further investigate. *See* Government Exhibit No. 790(b).

34. The defendant Pfeffer was acquainted with the defendants Keckeisen and Buchanan through various and timely work relationships and transitions and from limited social contacts. *See* Notes of Testimony, pp. 3.86-.88, 4.47, 4.88-.90. *But compare* Notes of Testimony, pp. 4.47-.48 *with e.g.* Notes of Testimony, p. 4.112. The defendant Pfeffer did not participate in the provision of international freight services to PTS. *See* Notes of Testimony, p. 4.132.

Conclusions of Law

Mail Fraud

1. The elements essential to establish a violation of the mail fraud statute, 18 U.S.C. § 1341, are a scheme or artifice to defraud and the use of the United States mails in execution of the scheme. *See, e.g., Pereira v. United States,* 347 U.S. 1 (1954); *United States v. Kaplan,* 554 F.2d 958 (9th Cir. 1977).

2. In order to establish a particular defendant's culpability for a mail fraud offense, the government has the burden of demonstrating beyond a "reasonable doubt that the defendant not only knowingly performed acts which the law forbids, but that he did the acts with the intent to violate the law." *United States v. Bryza,* 522 F.2d 414, 421 (7th Cir. 1975). As a consequence, there must be a recognizable scheme formed with the specific intent to defraud. *See, e.g., United States v. Bohonus,* 628 F.2d 1167, 1172 (9th Cir. 1980). "The critical element is fraudulent intent." *United States v. Regent Office Supply Co.,* 421 F.2d 1174, 1180 (2nd Cir. 1970).

3. The Government may satisfy the requirement that it demonstrate a specific intent to defraud attributable to a particular defendant by offering evidence of instances when the particular defendant took actions preventing the discovery of his misdeeds or, for purposes of the instant case, his breach of a fiduciary duty. *See United States v. Bryza, supra* at 422. The acts of forming artificial companies, creating or identifying conduits for receiving payments and failing to disclose economic interests constitute actions capable of manifesting specific intent. *See, e.g., United States v. Bush,* 522 F.2d 641, 649 (7th Cir. 1975); *United States v. Bryza, supra* at 422.

4. The object of a fraudulent scheme need not be the deprivation of a tangible interest but instead may relate to an intangible property. *See, e.g., United States v. Barta,* 635 F.2d 999, 1006 (2d Cir. 1980); *United States v. Bohonus, supra* at 1172; *United States v. Kelly,* 507 F. Supp. 495, 501 (E.D. Pa. 1981).

5. A scheme which is directed at depriving an employer of the honest and faithful services of its employees or of its "right to have its business conducted honestly may constitute a 'scheme to defraud' within the meaning of the mail fraud statute." *United States v. Kelly, supra* at 499. *See also United States v. Bohonus, supra* at 1172. However, the breach of an employee's fiduciary duty, without more, does not constitute such a violation. *See, e.g., United States v. Mandel,* 591 F.2d 1347, 1362 (4th Cir. 1979); *United States v. McDonald,* 576 F.2d 1350, 1359 n.14 (9th Cir. 1978). "The additional element which frequently transforms a mere fiduciary breach into a criminal offense is a violation of the employee's duty to disclose material information to his employer." *United States v. Barta, supra* at 1006. *See also United States v. Kelly, supra.*

6. The additional element of failure to disclose material information to an employer may be established by evidence of misrepresentations in company conflict of interest statement, withholding of information concerning interest in private enterprises which are being recommended to engage in contractual services, withholding of information concerning business advantages being afforded particular private enterprises and misrepresentations in recommendations utilized for the purpose of selecting private enterprises to perform contractual services. *See, e.g., United States v. Bush,* 522 F.2d 641, 647 (7th Cir. 1975); *United States v. Bryza, supra; United States v. Kelly, supra.* Accordingly, the material information withheld or misrepresented must be related to the conduct of the employer's business. *See, e.g., United States v. Rabbitt,* 583 F.2d 1014, 1024-25 (8th Cir. 1978).

7. Of course, if the object of a fraudulent scheme relates to the deprivation of a tangible property, a mail fraud offense may be found. Tangible property may be deprived when a service is provided a particular enterprise at a cost substantially less than that charged other various customers, when a private enterprise which is contracted to perform services does so at a cost higher than that actually charged by a competitor or when, as a result of recommendations, an employer is deprived of an opportunity to obtain better terms in a contract. *See United States v. Bush, supra* at 647-48.

8. In order to constitute a mail fraud offense there is no requirement that the victims of the crime ultimately suffer economic loss or damage. *See, e.g., United States v. Bush, supra* at 648; *United States v. Reicin,* 497 F.2d 563 (7th Cir. 1974). Nor is there a need for a victim to take retributive actions. *See United States v. Bryza, supra* at 422.

9. "The mailing element [necessary to establish a mail fraud offense] . . . consists of two requirements: (1) that the defendant caused the use of the mails and (2) that this use was 'for the purpose of executing' the deceptive scheme." *United States v. Pereira, supra* at 8-9.

10. The defendants Pinto, Keckeisen, Pfeffer and Buchanan engaged in a scheme to defraud American Airlines and used the mails in the furtherance of that scheme. Moreover, the aforenamed defendants had a specific intent to engage in the fraud, all in violation of 18 U.S.C. § 1341.

Elkins Act

11. 49 U.S.C. § 41(1) provides, in pertinent part, that "it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate . . . commerce by any common carrier . . . whereby any such *property shall . . . be transported at a less rate than that named in the tariffs published and filed by such carrier,* . . . or whereby any other advantage is given or discrimination is practiced." (Emphasis added).[10]

12. The intended purpose of this statute is "to prevent any kind of departure from the published rates and to that end [Congress] outlawed all rebates, without requiring a showing of benefit to any shipper." *United States v. Braverman,* 373 U.S. 405, 406 (1963). *See Baltimore and Ohio Chicago Terminal Railroad Company v. United States,* 583 F.2d 678, 690-91 (3d Cir. 1978).

10. *See* note 1 supra for the full text of 49 U.S.C. § 41(1). It may be noted that this statute was recodified, effective October 17, 1978, without substantive effect. 49 U.S.C. § 11903(a).

13. The government has failed to develop of record evidence beyond a reasonable doubt that there was a deviation from the tariff rates published and filed by PTS.

Conspiracy

14. Count I of the indictment charges that the defendants Pinto, Keckeisen, Pfeffer and Buchanan "did willfully and knowingly *conspire, confederate, combine and agree amongst themselves* and with others . . . to commit offenses against the United States in violation of Title 18, United States Code § 371 . . . ." (Emphasis added). The charge is that of a single, continuing conspiracy.

15. The primary element essential to establish the existence of a conspiracy is agreement.[11] "It is a partnership in criminal purpose. The gist of the crime is the confederation or combination of minds." *Marino v. United States*, 91 F.2d 691, 694 (9th Cir. 1937). "The formalities of an agreement [, however,] are not necessary . . . ." *United States v. Varelli*, 407 F.2d 735, 741 (7th Cir. 1969).

16. The existence of a conspiracy may be established by resort to or reliance upon circumstantial evidence. *See, e.g., United States v. Trotter*, 529 F.2d 806, 810 n.4 (3d Cir. 1976). A common purpose and plan may be inferred from a "development and collocation of circumstances." *Glasser v. United States*, 315 U.S. 60, 80 (1942).

17. In the present case, the common purpose of the conspiracy, particularly as charged in the indictment, was

11. Of course, the agreement must have an illegal purpose. *See United States v. Cahalane*, 560 F.2d 601, 604 (3d Cir. 1977); *United States v. Klein*, 515 F.2d 751 (3d Cir. 1975). In the present case, the illegal purpose has been earlier established and identified. *See* Conclusions of Law Nos. 1-10.

for PTS to procure and maintain American Airlines' freight business. The common purpose was not limited to the procurement and/or retention of particular American Airlines' "HUB" trucking routes or freight services. The defendants Pinto, Keckeisen, Pfeffer and Buchanan were members of the conspiracy and participated in the achievement of its objective. *See, e.g., Blumental v. United States,* 332 U.S. 539 (1947); *United States v. Boyd,* 595 F.2d 120 (3d Cir. 1978) (conviction reversed on other grounds).

18. In order to establish the participation of a particular defendant in a conspiracy, the government "must demonstrate that the defendant agreed with others to join the conspiracy and participate in the achievement of the illegal objective." *United States v. Grassi,* 616 F.2d 1295, 1301 (5th Cir. 1980). More than mere knowledge of a conspiracy and an association with its participants is required, *see, e.g., United States v. Falcone,* 311 U.S. 205 (1940), although evidence of this nature combined with other circumstantial evidence may prove joinder. *United States v. Etley,* 574 F.2d 850 (5th Cir. 1978).

19. Evidence of knowledge of a conspiracy in addition to actions taken in furtherance of it may imply a particular defendant's participation. *United States v. Provenzano,* 620 F.2d 985, 999 (3d Cir. 1980). Acts of receiving monetary payments in return for preferential treatment in contract relationships coupled with the continuation and expansion of such relationships despite geographical and promotional transfers constitute this type of evidence. These acts reflect and represent the receipt of profits or proceeds as well as the suggestion that the plan or purpose is not limited to the particular transactions. *See United States v. schoenhut,* 576 F.2d

1010, 1028 (3d Cir. 1978) and *Blumenthal v. United States, supra* at 558.

20. Evidence of meetings with co-conspirators and the resort to subterfuge for the receipt of monetary payments may also circumstantially establish or imply a particular defendant's participation in a conspiracy. *See, e.g., United States v. Calabro,* 449 F.2d 885, 889-90 (2d Cir. 1971) and *United States v. Cahalane, supra* at 605. "Such acts, though some might be innocent in themselves, when viewed as a whole tie the defendant inextricably to the conspiracy." *United States v. Schoenhut, supra* at 1027.

21. "[O]ne can be a party to a conspiracy even though he does not know of the existence or identity of all his co-conspirators, and even though he does not participate in *all* of their acts." *United States v. Friedman,* 445 F.2d 1076, 1080 (9th Cir. 1971). (Emphasis added). Nor must a particular defendant know all of the details of a conspiracy, just the essentials. *See United States v. Alvarez,* 625 F.2d 1196, 1198 (5th Cir. 1980).

22. "[T]he government, without committing a variance between a single conspiracy charged in an indictment and its proof at trial, may establish the existence of a continuing core conspiracy which attracts different members at different times and which involves different sub-groups committing acts in furtherance of the overall plan." *United States v. Boyd, supra* at 123. *See also United States v. Kenny,* 462 F.2d 1205, 1216 (3d Cir. 1972).

VERDICTS

The Court notes that its Conclusions of Law with respect to Count 1, charging conspiracy, are equally ap-

plicable to Counts 2-13, inclusive, charging mail fraud, insofar as they pertain to identifying the collective guilt of the defendants. "[A] multidefendant mail fraud scheme can be analyzed like a conspiracy." *United States v. Camiel*, 519 F. Supp. 1238, 1241 n.7 (1981), *citing, e.g. United States v. Cohen*, 516 F.2d 1358, 1364 (8th Cir. 1975). The Court finds the defendants Pinto, Keckeisen, Pfeffer and Buchanan guilty of each of Counts 1 through 13, inclusive, but finds them not guilty of Counts 14 through 21, inclusive.

An appropriate Order will be entered.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 81-00057

UNITED STATES OF AMERICA

v.

BIAGIO ROBERT PINTO, a/k/a BOB PINTO, GEORGE V. KECKEISEN, EDWARD PFEFFER and JOHN BUCHANAN

ORDER

AND NOW, this 14th day of January, 1982, the Court finds the defendants Pinto, Keckeisen, Pfeffer and Buchanan guilty as to each of Counts 1 through 13, inclusive, but not guilty as to each of Counts 14 through 21, inclusive.

/s/ JOHN B. HANNUM
John B. Hannum, *J.*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 82-1165 and 82-1169

UNITED STATES OF AMERICA

v.

EDWARD PFEFFER,
Appellant in No. 81-1165

GEORGE KECKEISEN,
Appellant in No. 81-1169

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not

having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

/s/ JOHN J. GIBBONS
John J. Gibbons
Judge

Dated: October 13, 1982

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1170

UNITED STATES OF AMERICA

v.

JOHN BUCHANAN,

Appellant

(D. C. Criminal No. 81-00057-04)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having

voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

/s/ JOHN J. GIBBONS
Judge

Dated: October 13, 1982

Office-Supreme Court, U.S.
FILED
FEB 4 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-954

In the Supreme Court of the United States

OCTOBER TERM, 1982

GEORGE V. KECKEISEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
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Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Pinto v. *United States*, cert. denied, No. 82-899 (Jan. 10, 1983) 1

United States v. *Barta*, 635 F.2d 999, cert. denied, 450 U.S. 998 ..... 4, 5

United States v. *Bohonus*, 628 F.2d 1167, cert. denied, 447 U.S. 928 4

United States v. *Braverman*, 373 U.S. 405 6

United States v. *Bronston*, 658 F.2d 920, cert. denied, No. 81-1441 (Apr. 5, 1982) 4

United States v. *Bryza*, 522 F.2d 414, cert. denied, 426 U.S. 912 4

United States v. *Bush*, 522 F.2d 641, cert. denied, 424 U.S. 977 4

United States v. *George*, 477 F.2d 508, cert. denied, 414 U.S. 827 4

United States v. *Isaacs*, 493 F.2d 1124, cert. denied, 417 U.S. 976 4

United States v. *Lovasco*, 431 U.S. 783 6

United States v. *Mandel*, 591 F.2d 1347, vacated on other grounds, 602 F.2d 653, cert. denied, 445 U.S. 961 4

United States v. *Rabbitt*, 583 F.2d 1014, cert. denied, 439 U.S. 1116 5

United States v. *States*, 488 F.2d 761, cert. denied, 417 U.S. 909 4

Page

Statutes:

Elkins Act, 49 U.S.C. 41(1) 1
18 U.S.C. 371 1
18 U.S.C. 1341 1

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-954

GEORGE V. KECKEISEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that their failure to inform their employer of their violations of the company's conflict of interest policy could not form the predicate for mail fraud under 18 U.S.C. 1341. They also claim that their mail fraud convictions are impermissibly inconsistent with their acquittal on several Elkins Act (49 U.S.C. 41(1)) counts.

1. After a bench trial in the United States District Court for the Eastern District of Pennsylvania, petitioners were convicted on 12 counts of mail fraud (18 U.S.C. 1341) and one court of conspiracy to commit those offenses (18 U.S.C. 371 and 1341).[1] Petitioner Keckeisen was sentenced to five

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[1]They were acquitted on eight counts charging violations of the Elkins Act, 49 U.S.C. 41(1). Co-defendant Biagio Robert Pinto stood trial with petitioners, and the district court entered the same judgment against him. His conviction was affirmed on appeal, and this Court denied certiorari. *Pinto* v. *United States*, No. 82-899 (Jan. 10, 1983).

years' imprisonment and petitioners Pfeffer and Buchanan were sentenced to two years' imprisonment. The court of appeals affirmed (Pet. App. A1-A9).

a. The evidence at trial, which is set out in the opinion of the district court (Pet. App. A13-A25), showed that petitioners, who were freight managers for American Airlines,[2] conspired with co-defendant Biagio Robert Pinto to give Pinto's trucking business preferential treatment in the awarding of contracts to transport freight between American Airlines' terminals. As a result of the conspiracy, American Airlines was deprived of the opportunity to secure a freight carrier that provided either a better quality of service or a lower price for its contracts (*id.* at A19).

Contract awards for trucking services between American Airlines' offices—known as "HUB" services—are made largely upon the recommendation of each office's local freight manager (Pet. App. A14). Between 1966 and January 1978, Pinto paid bribes and kickbacks, often through intermediaries, to petitioners.[3] In return, petitioners saw to it that Pinto's trucking company was given preferential treatment in the awarding of HUB contracts (*id.* at A16-A17).[4] In addition, petitioners Keckeisen and Buchanan

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[2]Petitioner Keckeisen became manager of freight services for American Airlines in Philadelphia in 1971. In 1976, he was transferred to New York to manage freight services at Kennedy Airport (Pet. App. A15). Petitioner Pfeffer managed freight services in Philadelphia from 1966 to 1971, when he was transferred to an administrative post in New York. In 1974, he moved on to Chicago's O'Hare Airport to manage its freight services for American Airlines (*ibid.*). Petitioner Buchanan served under both men in Philadelphia from 1966 to August 1976, when he succeeded Keckeisen as manager of freight services in Philadelphia (*ibid.*).

[3]In addition to cash payments, in 1974 Pinto gave petitioner Keckeisen an automobile (Pet. App. A16).

[4]Pinto had exclusive rights to the Philadelphia HUB route from at least 1966 until some point in 1981 (Pet. App. A18). Within two months of his transfer to Chicago in 1974, Pfeffer secured the Chicago to

provided Pinto with international freight services at the American Airlines Philadelphia freight department "at a rate substantially less than that charged other customers" (*id.* at A22).

Although petitioners knew of a company policy forbidding employees or their family members from receiving money or gifts from suppliers of services to the company, petitioners failed to report to American Airlines that Pinto paid them substantial sums of money (Pet. App. A16-A18). Moreover, when Keckeisen received an anonymous letter in November 1972 alleging that Pinto was paying money to Buchanan's wife, Keckeisen merely conducted a brief, inconclusive investigation (*id.* at A24-A25).

b. After considering the evidence at trial, the district court entered extensive findings of fact and conclusions of law (Pet. App. A10-A32). The trial court determined that petitioners and Pinto conspired to defraud American Airlines and used the mails in furtherance of the scheme. Accordingly, it convicted petitioners and Pinto on the mail fraud counts (*id.* at A25-A28). The court acquitted petitioners and Pinto on the Elkins Act charges, however, because there was no evidence of deviation from Pinto's published tariff rates (*id.* at A28-A29). The court of appeals affirmed by judgment order (*id.* at A1-A9).

Indianapolis HUB route for Pinto. Pfeffer stated in his written recommendation that Pinto would charge less than the existing carrier (*id.* at A19-A20). In reality, however, Pinto charged American Airlines more than the predecessor carrier and otherwise violated the terms of his contract (*id.* at A20-A21). In 1977, Keckeisen unsuccessfully attempted to obtain the New York-Syracuse HUB route for Pinto. Keckeisen claimed that Pinto would charge a lower rate than the existing carrier and that the latter's service had proven to be unreliable (*id.* at A23). Despite an American Airlines' investigation that refuted both points, Keckeisen adhered to his claims (*ibid.*).

2. Petitioners contend (Pet. 10-16) that the mail fraud statute, 18 U.S.C. 1341, does not reach their conduct because they did nothing more than violate American Airlines' conflict of interest policy. This contention is without merit.

The courts of appeals have uniformly held that the mail fraud statute extends to breaches of fiduciary duty like that involved in this case, and this Court has consistently declined to review those decisions.[5] In such situations, the offense is established if the government proves that the defendant failed to disclose material information when he was under a duty to do so, and that he used the mails to execute his fraudulent scheme. *United States* v. *Barta*, 635 F.2d 999, 1005-1007 (2d Cir. 1980), cert. denied, 450 U.S. 998 (1981).

Under these principles, there was abundant proof of petitioners' guilt. Each petitioner had a fiduciary obligation to provide undivided loyalty to his employer, American Airlines, and to advise American of any personal interest that was adverse to the company's. Moreover, petitioners well knew that they had an affirmative duty not to receive money

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[5]See *United States* v. *Bronston*, 658 F.2d 920, 926-928 (2d Cir. 1981), cert. denied, No. 81-1441 (Apr. 5, 1982); *United States* v. *Barta*, 635 F.2d 999, 1005-1007 (2d Cir. 1980), cert. denied, 450 U.S. 998 (1981); *United States* v. *Bohonus*, 628 F.2d 1167, 1170-1173 (9th Cir.), cert. denied, 447 U.S. 928 (1980); *United States* v. *Mandel*, 591 F.2d 1347, 1361-1364, vacated on other grounds, 602 F.2d 653 (4th Cir. 1979), (en banc), cert. denied, 445 U.S. 961 (1980); *United States* v. *Bush*, 522 F.2d 641, 646-648 (7th Cir. 1975), cert. denied, 424 U.S. 977 (1976); *United States* v. *Bryza*, 522 F.2d 414, 421-423 (7th Cir. 1975), cert. denied, 426 U.S. 912 (1976); *United States* v. *Isaacs*, 493 F.2d 1124, 1149-1150 (7th Cir.), cert. denied, 417 U.S. 976 (1974); *United States* v. *States*, 488 F.2d 761, 764-766 (8th Cir. 1973), cert. denied, 417 U.S. 909 (1974); *United States* v. *George*, 477 F.2d 508, 512-514 (7th Cir.), cert. denied, 414 U.S. 827 (1973).

from Pinto, who provided services to American. Despite these obligations, petitioners never revealed to American that they and members of their families received payments and other gratuities from Pinto.[6] Not only did petitioners fail to disclose material facts, but their scheme was designed and was likely to cause harm to their employer. As the district court found (Pet. App. A19), because of petitioners' efforts, American was prevented from seeking out other freight carriers that charged less for their contracts and provided better services.[7] The court of appeals therefore properly affirmed petitioners' convictions on the mail fraud counts (*id.* at A1-A9).

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[6]Petitioners' reliance (Pet. 10-12) on *United States* v. *Rabbitt*, 583 F.2d 1014 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979), accordingly is misplaced. In that case, a state legislator was absolved of mail fraud charges arising from his assistance in gaining state contracts for an architectural firm. He received a 10% commission on the work he secured for the firm, but his position as a legislator did not impose upon him any affirmative duty to disclose his interest in the transactions. Here, by contrast, petitioners had a duty not to receive gratuities and to inform their employer of any breaches of that obligation, a duty that they concede they violated (Pet. 12). In *United States* v. *Barta*, *supra*, 635 F.2d at 1007, on which petitioners also rely (Pet. 12), the Second Circuit found a similar reporting duty in the defendant's employment relationship. The court accordingly reinstated the charges against Barta, which had been dismissed by the district court on a theory similar to that espoused by petitioners.

[7]The award to Pinto of the Chicago to Indianapolis HUB route clearly cost American more money than the predecessor carrier charged (Pet. App. A20-A21). American also lost money on its provision of international freight services to Pinto in Philadelphia (*id.* at A21-A22). Finally, the personal payments made by Pinto to petitioners in order to secure the American Airlines contracts are at least a partial measure of the loss suffered by American, since Pinto's firm would presumably have been willing to lower its charges by at least that much had it been able to secure the business by legitimate means not involving such payments.

3. Petitioners also argue (Pet. 16-18) that their acquittal on the Elkins Act charges is inconsistent with their mail fraud convictions, and hence their mail fraud convictions cannot stand. Petitioners, however, did not raise this claim in the court below (Pet. App. A1-A9) and thus may not raise it for the first time in this Court. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

In any event, there is no merit to petitioners' claim, for there simply is no inconsistency between the verdicts on the two different sets of charges. The district court found (Pet. App. A29) that the government had failed to show that Pinto's trucking company had deviated from its published tariff rates, a requirement for an Elkins Act violation. See *United States* v. *Braverman*, 373 U.S. 405 (1963). Pinto's payments to petitioners were not tied to his published tariff rates, and therefore did not constitute rebates under the Elkins Act. But, while the payments may not have run afoul of the Elkins Act, they clearly were bribes designed to ensure that Pinto would continue to receive contracts from American. Thus, there is no inconsistency in the district court's findings in this case, and further review of this essentially fact-bound issue is unwarranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

FEBRUARY 1983

DOJ-1983-02